SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM 1970

No. 1417

LARSEN FORD, INC.,

Petitioner,

against

NANCY GASPERINO, as Administratrix of the Estate of Gregory Gasperino, Deceased,

and

FORD MOTOR COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF LARSEN FORD, INC.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF LARSEN FORD, INC.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Larsen Ford, Inc., prays that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit and the denial of a petition for a rehearing or a rehearing *in banc*, affirming a judgment entered in the

United States District Court for the Southern District of New York on June 6, 1969 in favor of the respondent, Nancy Gasperino as Administratrix of the Estate of Gregory Gasperino, Deceased, against petitioner, Larsen Ford, Inc., in the amount of $215,899 plus interest in the amount of $64,770, in the total amount of $280,669, in an action for the wrongful death of the deceased Gregory Gasperino and dismissing the third-party complaint of petitioner, Larsen Ford, Inc., brought against respondent, Ford Motor Company, entered upon an opinion decision by District Judge David N. Edelstein, rendered after trial without a jury.

The opinion of the Court of Appeals is not yet reported. A copy thereof is appended hereto (*infra*, p. 30). The opinion of Judge Edelstein in the District Court is reported at 300 F. Supp. 1182 and a copy thereof is appended hereto (*infra*, p. 36).

Jurisdiction

The judgment of the Court of Appeals affirming the judgment of the District Court is dated May 25, 1970 and was entered on May 25, 1970.

Orders of the Court of Appeals denying a petition for rehearing containing a suggestion that the action be reheard *in banc* were made and entered on June 25, 1970.

Jurisdiction to review the judgment by a writ of certiorari is invoked under 28 U.S.C. Sec. 1254(1) and Sec. 2101(c) and Rule 19.1(b) of this Court.

Questions Presented for Review

1. In a diversity action involving a claim of liability for wrongful death, may a property owner be held liable under Section 200 of the New York Labor Law where the

death was precipitated by the inhalation of carbon monoxide fumes resulting from the performance by the decedent of work for and at the direction of his employer, and the owner of the premises neither supervised nor controlled the work?

2. Under applicable New York law, if a property owner may be held liable for the death of an employee of another performing work on the property owner's premises for and at the direction of his employer, is not the property owner entitled to indemnification from the employer, where the property owner neither supervised nor controlled the work and the death was precipitated by conditions created by the work being performed?

3. In an action tried to the Court without a jury, is not an award of $215,899 to the beneficiaries of a decedent 46 years of age earning approximately $10,000 a year, who was suffering from a pre-existing progressive atherosclerotic heart disease and the direct cause of death was atheromatous occlusion of the coronary arteries due to atherosclerosis, so grossly excessive as to amount to a denial to the petitioner of equal protection under the law?

Statutes Involved

Section 200 of the Labor Law of the State of New York, McKinney's Consolidated Laws of New York Annotated, Book 30 (1965), p. 141.

Decedent Estate Law of the State of New York, Article 5, Sections 130 and 132, McKinney's Consolidated Laws of New York Annotated, Book 17B, EPTL 11-1.1 to End (1967), Appendix 1, p. 497.

The text of these statutes is set forth in the Appendix hereto (*infra*, pp. 27, 28).

Statement of the Case

The basis of federal jurisdiction in the Court of first instance is diversity of citizenship between the respondent Nancy Gasperino as Administratrix of the Estate of Gregory Gasperino, Deceased, both citizens and residents of the State of New Jersey, and petitioner, a New York corporation, in an action for wrongful death for the benefit of the next of kin of the decedent under the New York Decedent Estate Law, demanding damages in excess of the amount of $10,000 exclusive of interest and costs.

In this diversity action tried to the Court without a jury, petitioner has been held liable to respondent, Nancy Gasperino as Administratrix of the Estate of Gregory Gasperino, deceased, solely because of an asserted violation by petitioner of a duty owing to Gregory Gasperino under Section 200 of the Labor Law of the State of New York and has been denied a judgment over against respondent Ford Motor Company, the decedent's employer.

The cause of decedent's death as found *upon autopsy* was an atheromatous occlusion of the coronary arteries due to atherosclerosis. The occlusion was found by the District Court to have been induced or precipitated by the inhalation of carbon monoxide fumes while decedent was performing work for and at the direction of his employer, Ford Motor Company, on premises owned by petitioner.

Although decedent at the time of his death was 46 years of age, earning $10,000 a year, and had at the time of his death, as shown by the autopsy, a pre-existing progressive atherosclerotic heart disease (D. C. Op. *infra*, p. 38), damages were awarded by the District Court, and upheld by the Court of Appeals, in the principal amount of $215,899 based upon a full work expectancy to age 65 of 18.8 years and upon the assumption that during the last 14 years of this assumed life expectancy, decedent would

earn an average of $15,000 a year, without there being any proof as to probable prospective earnings except for a single impending promotion for which allowance was made by computing the lost earnings for the 5 years prior to trial at an average of $11,000 a year (D. C. Op. *infra*, pp. 52, 53).

Prior to decedent's death on April 6, 1964 the Ford Motor Company had made arrangements with Larsen Ford, Inc., an independent Ford dealer, to store approximately 100 Ford Mustangs in the basement of the Larsen premises, which Ford wished to keep from public view until they were exhibited in connection with a promotional campaign on April 14, 1964 (D. C. Op. *infra*, p. 37). Gasperino was assigned to take charge of the operation of the placing of these cars in the Larsen basement and the preparation of the cars for public exhibition. Pursuant thereto he proceeded to the Larsen premises on the evening of April 3rd where he was engaged from 8:30 P. M., until 2:00 A. M. on Saturday, April 4th and throughout Saturday, April 4th, and Sunday, April 5th, from 8:30 A. M. until 5:30 P. M., driving the cars from carrier vans on the ground level into the storage basement. On Monday, April 6th, he resumed work at 8:30 A. M. On this day he was joined by five other Ford employees who were engaged under his supervision in readying the cars for exhibition (D. C. Op. *infra*, p. 37).

The work being performed by the Ford employees on April 6th involved running the motors of the cars in order to move them into position where they could be worked upon and in checking fluid levels. While it was found by the District Court that Larsen knew or should have known of the fact that the engines of the cars would have to be run in order to perform the work which the Ford employees were directed by their employer to perform (D. C. Op. *infra*, p. 37), admittedly Larsen neither directed nor controlled the work and as found by the District Court

"had no control of Gasperino or say in the manner in which Gasperino was to discharge his duties" (D. C. Op. *infra*, p. 42).

The Larsen basement was solely and exclusively a storage area for automobiles and contained no mechanical means of ventilation. This was open and apparent and was known to Gasperino and the other Ford employees. There is no suggestion in the evidence and no finding that Larsen was ever requested by the Ford employees to provide any mechanical means of ventilation or that any complaint was ever made to Larsen by the Ford employees of the working conditions in the basement, although as one of the witnesses said, which was noted by the Court of Appeals, "There was quite a bit of raw exhaust fumes in the air" (C. A. Op. *infra*, p. 32). At about 2:30 P. M. on April 6th Gasperino collapsed and was removed from the basement by other employees. After removal to the hospital he died at 3:50 P. M.

Gasperino left surviving a widow and three children, aged 19, 17 and approximately 12, at the time of his death. Without making any allowance for decedent's share of the household expenses and maintenance, the District Court allowed damages of $51,100 based upon assumed earnings of $11,000 a year for the five years prior to trial, less only $15 a week for decedent's personal use, and $139,000 for the present value of future lost benefits based upon the assumption of earnings of $212,708 for approximately 14 years, an average of $15,000 a year, without any evidence whatever in the record to support any such future earnings, again deducting only $15 per week for decedent's personal use: to which was added $24,000 as the estimated value of personal services and attention to the infant children and funeral expenses of $1,799 (D. C. Op. *infra*, p. 52).

Reasons for Granting the Writ

I

The decision below is in clear and obvious conflict with the law of New York interpreting and applying Section 200 of the New York Labor Law, as enunciated by the highest Court of Appeals of the State of New York in a long line of decisions.

The Court of Appeals has upheld a decision of the District Court of the Southern District of New York holding petitioner liable for a violation of a duty under Section 200 of the Labor Law owing to decedent, an employee of an independent contractor performing his employer's work on petitioner's premises without the citation of a single authority from the courts of the State of New York in support of its holding and in direct conflict with a long line of decisions of the New York Court of Appeals (the highest Court of Appeals of the State) interpreting and applying Section 200 of the Labor Law which were cited to it and discussed in petitioner's brief on appeal.

From a reading of the decision of the Court of Appeals it would seem to appear that the New York courts had never passed upon the application of Section 200 of the Labor Law to a fact pattern such as is found in the instant case. Quite to the contrary, the Court of Appeals in 1916 in the case of *Hess v. Bernheimer & Schwartz Brewing Co.*, 219 N. Y. 415, 114 N. E. 808, decided most definitely in a case having a fact situation closely analogous to the instant case that there was no liability under Section 200 of the Labor Law for the death of an employee of an independent contractor performing work upon the owner's premises where the death arose out of and in consequence of the work being performed despite the fact that in that case the work was being performed at the request of and for the benefit of the owner of the premises and the per-

formance of the work would of necessity create a highly dangerous condition if no means of mechanical exhaust of dangerous fumes produced by the work were provided. There an employee of a contractor employed by the owner of the premises to varnish beer vats on the employer's premises was overcome by fumes produced by vapors arising from the varnish. The Court held that "proper regard for the safety of the workman required the use of blowers to carry off the poisonous vapors arising from the varnish" and that "it was extremely dangerous for men to work under existing conditions unless such blowers were used to purify the air" (219 N. Y. at p. 417). Nevertheless the Court held there was no duty on the part of the owner to supply such blowers and that failure to supply them was the fault of the employer.

The contention was made in that case that the Labor Law (now Section 200) imposed upon the owner of the premises a duty to make the work area reasonably safe for the workmen employed therein. The Court in concluding that no such duty was imposed by the Labor Law upon the owner of the premises, wrote as follows (219 N. Y. at p. 418):

> "But the statute refers to the employer's plant and not to the contractor's equipment. If the appellant had done this work by its own employees it would have been its duty to use reasonable care in providing suitable appliances to carry the fumes of the varnish from the vat in which the workmen were engaged. (McGovern v. Central Vt. R.R. Co., 123 N. Y. 280-288). It cannot be said, however, that the duty of the employer is by this provision of the statute extended to supervision of the method of doing the work by the contractor, or that the employer thereby becomes responsible for the negligence of the contractor in failing to furnish proper appliances therefor."

So reasoning the Court concluded (p. 419):

> "So far as the case proceeds on the theory that the lack of blowers was a defect in the appellant's plant we think the plaintiff must fail."

The *Hess* case is not a unique case standing apart on its facts in the law of New York. It has been consistently cited, approved and applied by the New York Court of Appeals in the intervening years up to the present time. See, e.g., *Olsommer* v. *George W. Walker & Sons, Inc.*, 4 A. D. 2d 424, 432, 166 N.Y.S. 2d 323, 332, 333, aff'd 4 N. Y. 2d 793, 144 N. E. 2d 528 (1958); *Zucchelli* v. *City Construction Co.*, 4 N. Y. 2d 52, 56, 149 N. E. 2d 72 (1958); *Gasper* v. *Ford Motor Company*, 13 N. Y. 2d 104, 110, 192 N. E. 2d 163 (1963); *Persichilli* v. *Triborough Bridge & Tun. A.*, 16 N. Y. 2d 136, 145, 209 N. E. 2d 802 (1965), all of which were cited to the Court of Appeals in petitioner's brief in that Court.

In *Olsommer*, the Appellate Division for the Fourth Department, whose decision was affirmed by the New York Court of Appeals, wrote as follows (4 A. D. 2d at p. 432, 166 N.Y.S. 2d at p. 332):

> "An owner or general contractor is not obliged to intervene to deter a subcontractor's employee from doing his work without a safety device which the subcontractor neglects to furnish (Hess v. Bernheimer & Schwartz Pilsener Brewery Co., 219 N. Y. 415, 114 N. E. 808; Borshowsky v. B. Altman & Co., 280 App. Div. 599, 116 N.Y.S. 2d 299, affirmed 306 N. Y. 798, 118 N. E. 2d 818; Italiano v. Jeffrey Garden Apts., 3 A. D. 2d 677, 159 N.Y.S. 2d 338)."

In the instant case liability has been imposed upon petitioner apparently on the premise that since it "knew that the Mustangs were to be prepared for public exhibition

and was aware of the nature of the operation to be performed on its premises" (C. A. Op. *infra*, p. 32) it had a duty to provide mechanical ventilation to take off the fumes which might be produced in the course of those operations. This under New York law is not sufficient basis for liability under Section 200 of the Labor Law.

Obviously in the *Hess* case the owner was aware of the operation to be performed since it had employed the decedent's employer to perform the operations for its own benefit, whereas here the operations were being performed by Ford, not at the request of or for the benefit of Larsen, but for its own sole benefit.

Under New York law, however, it matters not that the owner of the premises might even have express knowledge of the specific danger which has been created on its premises. Thus in *Zucchelli* v. *City Construction Co.*, *supra*, thirteen workmen were injured as the result of the collapse of a concrete floor in a building under construction by reason of the removal a few days previously of a wooden form encasing a beam, which form had been used to brace the horizontal shoring supporting the floor. The owner had supervisory personnel on the job site who, as found by the Trial Court, had notice of the dangerous condition thus created and had done nothing about it. The Court of Appeals in holding that there was no liability upon the owner of the premises under Section 200 of the Labor Law, wrote as follows (4 N. Y. 2d, p. 56):

> "Hess v. Bernheimer & Schwartz Pilsener Brewing Co., 219 N. Y. 415, 418, 114 N. E. 808, similarly makes it clear that the 'place' which under Section 200 of the Labor Law the owner (or general contractor) must make and keep safe does not include the subcontractor's own 'plant' and equipment or the very work he is doing. The statute does not put on the owner (or general contractor) a fresh obligation to super-

> vise, in the interest of employees of the subcontractor, the latter's operation of its own plan through its own employees."

In *Gasper v. Ford Motor Company, supra*, the Court of Appeals in 1963 again had before it a death action involving the question of the duty owing by the owner of premises to an employee of an independent contractor working on the premises. In that case a window cleaner was engaged in cleaning windows in defendant's plant which had an enclosed bridge or elevated walkway containing ventilating windows which opened horizontally. He had opened the lower half of one of the windows horizontally and placed a plank across the upturned face of the glass window panes extending outward upon which he sat to clean the outside panes on the upper half of the window. The window gave way precipitating him to the ground. There was testimony that this method of cleaning the windows of the enclosed bridge had been employed on previous occasions to the knowledge of the building owner.

Reviewing the New York law at length, the Court concluded that there was no liability upon the defendant, Ford Motor Company, for any breach of common law or Sec. 200 obligations, saying (13 N. Y. 2d, p. 111):

> "Defendant's knowledge that the windows had been cleaned previously by the same method does not fasten liability upon it (Borshowsky v. Altman & Co., 280 App. Div. 599, 116 N.Y.S. 2d 299, aff'd 306 N. Y. 798, 118 N. E. 2d 818, supra). Ford had no duty to supervise the method by which decedent cleaned the windows or to supply him with the equipment necessary to perform the work (Borshowsky v. Altman & Co., supra)."

Finally, as late as 1967, the Court of Appeals again reviewing the subject of an owner's liability under the safe

place to work doctrine (Section 200 of the Labor Law) in *Persichilli v. Triborough Bridge & Tun. A., supra*, wrote as follows (16 N. Y. 2d at p. 145):

> "It is by this time well settled that the duty to provide a safe place to work is not breached when the injury arises out of a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work (Wright v. Belt Assoc., 14 N. Y. 2d 129, 134, 249 N.Y.S. 2d 416, 418, 198 N. E. 2d 590, 591; Gasper v. Ford Motor Co., 13 N. Y. 2d 104, 110-111, 242 N.Y.S. 2d 205, 208-209, 192 N. E. 2d 163, 165-166; Zucchelli v. City Constr. Co., 4 N. Y. 2d 52, 56, 172 N.Y.S. 2d 139, 142, 149 N. E. 2d 72, 74; Hess v. Bernheimer & Schwartz Pilsener Brewing Co., 249 N. Y. 415, 418-419, 114 N. E. 808, 809). The Hess case particularly is apposite here."

After discussion of *Hess* in detail, the Court concluded on the issue whether the owner of property was liable to a workman overcome by gas on its premises as follows (16 N. Y. 2d, p. 147):

> "Since neither Tri-Borough nor the City was required to supply gas measuring devices or air blowers to decedent, their failure so to do does not give rise to any liability to plaintiff."

The principle of the foregoing cases was again upheld and reaffirmed by the New York Court of Appeals on July 1, 1969 in a case in which it granted permission to appeal after affirmance of the judgment in favor of the plaintiff was sustained by the Appellate Division, Second Department, in *Bidetto v. New York City Housing Authority*, 25 N. Y. 2d 848, which case was brought to the attention of the Court of Appeals in petitioner's brief on appeal herein.

In view of these most definitive and clear decisions of the highest Court of New York, it is incomprehensible how the Court of Appeals in the instant case could have sustained a judgment against petitioner for a violation of duties owing to decedent under Section 200 of the Labor Law without even any discussion of the New York law or any attempt to distinguish these authorities.

The only cases cited by the District Court in support of its holding of liability on the part of petitioner for a violation of Section 200 are two lower court decisions, viz., *Gasper* v. *Ford Motor Company*, 11 A. D. 2d 902, 203 N.Y.S. 2d 382 (1960), and *Siegel* v. *Prima Concrete Construction Corp.*, 279 N.Y.S. 2d 95 (1967), officially reported at 27 A. D. 2d 946 (D. C. Op. *infra*, p. 48). The decision of the Appellate Division in *Gasper* v. *Ford* was subsequently reversed, after retrial, by the Court of Appeals by its decision in the same case in 13 N. Y. 2d 104, cited and discussed *supra*.

The *Siegel* case involved an entirely different set of circumstances than here presented. There the plaintiffs were not injured as a result or incident of the work being carried on by their employer. On the contrary their injuries occurred by reason of a propane gas explosion which occurred when they opened the door of a vault of a bank under construction which they were required to enter in order to perform their contract service. A propane heater had been placed by another contractor about 16 hours previously within the vault, during which period of time the door of the bank vault had been kept closed. The *Hess* case and the cases following it, cited and discussed *supra*, clearly establish the distinction between that case and the present one. The Court of Appeals did not affirm upon the basis of the cases cited by the District Court, but without the citation of any decisional law whatever.

It is respectfully submitted that the decision below is in complete and clear error under New York law.

There can be no dispute at this late date that the federal courts are required to apply the law of the State as enunciated by the highest Court of Appeals of the State and are not free to decide questions of State law as they choose without regard to the authoritative decisional law of the State under the doctrine of *Erie* v. *Tompkins*, 304 U. S. 64, and the mandate of 28 U.S.C. § 1652. This Court has repeatedly held that the mandate of *Erie* v. *Tompkins*, requires that State Law questions be decided by federal courts as if they were simply another state court, so that the bringing of suits in diversity cases in the federal courts should not achieve substantially different results than would be produced by the bringing of a suit in a court of the State whose law is involved. Thus, in *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169 (1940), this Court said at page 180:

> "It is inadmissible that there should be one rule of State law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the status of diversity of citizenship."

In *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1944), this Court stated that, in enforcing a State created right a federal court is in substance, "only another court of the state", and that it is accordingly abhorrent to the *Erie* doctrine that "the accident of a suit by a non-resident litigant in a federal court instead of in a state court a block away" should lead to substantially different results (pp. 108-109).

The *Erie* rule, this Court said in *Hanna* v. *Plumer*, 380 U. S. 460 (1965) at page 467:

> "* * * is 'rooted in part in the realization that it would be unfair for the character or result of a liti-

gation materially to differ because the suit had been brought in a federal court."

The result achieved here is so apparently a repudiation of state law on the subject as to openly invite the bringing of actions in the already over-crowded District Courts of New York in order to circumvent the restrictions of state law in an important field of industrial law which is so highly fruitful of litigation particularly in the State of New York.

II

If petitioner could properly be held liable in this case for a violation of Section 200 of the Labor Law of the State of New York, it clearly would be entitled under applicable New York law as enunciated by the New York Court of Appeals to indemnity from the employer in the performance of whose work the dangerous conditions were created. Obviously, the basement garage did not present any condition of danger to anyone entering the garage on the morning of April 6th when the Ford employees went into the garage to perform their work. It only became dangerous during the progress of and because of the work carried on. The danger was one which developed during the day because of the extent to which the engines of the Ford Mustangs were being operated by the Ford employees throughout the period from 8:30 in the morning until 2:30 in the afternoon. There is no proof in the record and there is no finding that Larsen had actual knowledge of the extent to which the engines of the cars were being operated or as to conditions which were being created in the basement by reason of those operations. The most that has been held is that petitioner was aware of the nature of the operation and should have known that the engines of the cars would be operated. Liability has been imposed not because petitioner ordered or directed or controlled the work, but merely because as owner of the premises it

had the imported duty under Section 200 of the Labor Law to provide adequate ventilation in view of the work being performed.

For such a liability, the New York Court of Appeals has held that the owner of the premises is entitled to indemnity from the person directing or controlling the work. In *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, 107 N. E. 2d 463 (1952), a shipowner had been held liable to a longshoreman overcome by carbon tetrachloride fumes while working aboard one of its vessels for failure to provide the longshoreman with a safe place to work under the Maritime Law. The Court of Appeals nevertheless held that the shipowner was entitled under New York Law principles of indemnity to recover over from the stevedore because as between it and the shipowner it was in control of the work and had the primary duty to perform its operations in a careful and prudent manner. So here, as demonstrated by the decision of the Court of Appeals in the *Hess* case, cited and discussed *supra*, the primary duty to provide adequate ventilating equipment and to perform the work in a careful manner so as to prevent the accumulation of an excessive amount of carbon monoxide in the atmosphere rested upon the Ford Motor Company, the employer.

Under *McFall*, Larsen was clearly entitled therefore under New York Law principles of indemnity, to recover over from Ford. The fact that Larsen may be chargeable with constructive knowledge of the dangerous condition which ultimately was created in the basement storage area, cannot under New York common law principles of indemnity which are here applicable operate as a bar to indemnity. Thus, in *Jackson* v. *Associated Dry Goods Corp.*, 13 N. Y. 2d 112, 194 N. E. 2d 167 (1963), where liability was imposed upon a property owner in respect of a member of the public because of an unsafe condition created by an independent contractor, the Court wrote in respect of the

property owner's right to indemnity, as follows (13 N. Y. 2d at p. 117):

> "Obviously, in a case where there is no actual notice but there is only constructive notice because of failure to discover that which could reasonably have been discovered, the defendant cannot be charged with acquiescence in the dangerous condition as a bar to indemnity. (Ruping v. Great Atlantic & Pacific Tea Co., 283 App. Div. 204, 206, 126 N.Y.S. 2d 687, 690; Employers' Liab. Assur. Corp. v. Empire City Iron Works, 7 A. D. 2d 1012, 184 N.Y.S. 2d 728.)"

Insofar as the New York Labor Law is concerned, it has been definitely held by the New York Court of Appeals that only under Section 241 of the New York Labor Law, where the owner's obligation is not only "non-delegable", but also "positive", can liability for indemnity be denied, and that a claim to indemnity when liability is based on other sections of the Labor Law remains unaffected. *Semanchuk v. Fifth Ave. & 37th St. Corp.*, 290 N. Y. 419, 49 N. E. 2d 508 (1943) and *Wischnie v. Dorsch*, 296 N. Y. 257, 72 N. E. 2d 760 (1947).

In *Wischnie* v. *Dorsch*, the Court of Appeals, referring to its earlier decision in the *Semanchuk* case said (296 N. Y. p. 261):

> "In that case we concluded that, in construction and demolition projects, the statute imposed a 'positive' duty upon the owner and contractor alike (Labor Law, Sec. 241); that it was an active, primary duty. We also concluded, and it seems to have been overlooked, that we should not extend such rule to other fields not included in its scope (Labor Law, Sec. 241), but leave those situations to be controlled by the rules and standards antedating the statute."

The rules and standards referred to in the above citation are summed up in the decisions of the New York Court of

Appeals in *Oceanic Steam Navigation Co.* v. *Compania Transatlantica Espanola*, 134 N. Y. 461, 31 N. E. 987 (1892) and *Scott* v. *Curtis*, 195 N. Y. 424, 88 N. E. 794 (1909). In *Oceanic Steam Navigation Co.* v. *Compania Transatlantica Espanola*, 134 N. Y. at pages 467-8, the principle is thus stated:

> "* * * that one who has been held legally liable for the personal neglect of another is entitled to indemnity from the latter no matter whether contractual relations existed between them or not, and that the right to indemnity does not depend upon the fact that the defendant owed the plaintiff a special or particular legal duty not to be negligent."

In *Scott* v. *Curtis*, 195 N. Y. at page 428:

> "Where the liability rests upon two or more persons who are as against the person injured jointly liable for the injury the rule invoked by the defendants that the court should not interfere as between joint tort feasors is not applicable, where one of the two or more persons chargeable with negligence is primarily liable therefor and the others are only liable by reason of their ownership of the property and not by reason of any negligence occurring by their active interposition or with their affirmative knowledge and assent."

The reliance by the Court of Appeals upon its prior decision in *Burns* v. *Cunard Steamship Company*, 404 F. 2d 60 (1968), cert. den. 393 U. S. 1117 (1969), is misapplied. There, liability was imposed upon Cunard because the accident was occasioned by a pre-existing hole in the pavement of an area under the exclusive control of Cunard which the third-party defendant's employees were required to use in the prosecution of their work. The condition was neither created nor contributed to by the third-party defendant.

III

The damages awarded in this case are so egregiously excessive as to amount to a denial to petitioner of equal protection under the law, and the award is in clear conflict with decisions of this Court, of the Courts of Appeals and other federal courts in respect to the rules of damages in death actions.

The amount of recovery under the Decedent Estate Law of the State of New York applicable in the present case (Section 132 of Decedent Estate Law, *infra*, p. 29) is limited to the "pecuniary injuries resulting from Decedent's death, to the person or persons for whose benefit the action is brought." The New York statute by its very terms limits recovery to the same extent as recoveries have been held by this Court to be limited under the Federal Employers Liability Act, 45 U.S.C. Sec. 51. In a case involving the F.E.L.A. this Court wrote as follows in *Chesapeake & O. R. Co.* v. *Kelly*, 241 U. S. 485, 489, 60 L. ed. 1117:

> "The damages should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased."

Applying this principle, United States District Judge Zavatt of the Eastern District of New York in *Montellier* v. *United States*, 202 F. Supp. 384, aff'd 315 F. 2d 189 (2 Cir., 1963), held that a widow and two children were entitled to three-quarters of the prospective net earnings of the decedent, that when the first child reached majority the loss to the widow and next of kin would be reduced to two-thirds of his prospective earnings and for the period during which the widow alone would be entitled to a contribution, the proportion of net earnings would be reduced to one-half (202 F. Supp. 423). The decision of Judge Zavatt was sustained by the Court of Appeals for the

Second Circuit. The *Montellier* case was an action under the Federal Tort Claims Act involving the application of the New York Decedent Estate Law.

In *Petition of Marina Mercante Nicaraguense, S.A.*, 248 F. Supp. 15 (1965), United States District Judge Weinfeld of the Southern District of New York having before him a case involving the application of the Jones Act and the New Jersey Death Act which, similar to that of New York, are based upon "pecuniary injuries", similarly held that where a decedent left a widow and several children the percentages of net earnings, after deducting the amounts taken by the decedent for his personal use, which represented pecuniary loss to the widow and children should be 75% where there are 3 or 2 children, 66⅔% where there is one child, and 50% where the wife is the sole beneficiary (248 F. Supp. at p. 27). Judge Weinfeld's opinion in this respect was affirmed by the Court of Appeals for the Second Circuit in 364 F. 2d 118.

In *O'Connor* v. *United States*, 269 F. 2d 578 (2 Cir. 1959), cited by the Court of Appeals herein (*infra*, p. 35), the Court of Appeals issued a remittitur from $150,000 to $90,000 in a death action because of the failure of the District Court to allocate to decedent his proportionate part of the family expenses and to deduct from his future earnings one-third for his own expenses until his surviving child should become 21 and then one-half.

From that time to the present, the district courts in the Second Circuit have consistently followed the principle therein enunciated. In addition to *Montellier*, and *Petition of Marina Mercante*, *supra*, see also *Meehan* v. *Central R.R.*, 181 F. Supp. 594, 620 (S.D.N.Y., 1960), wherein the court allowed the beneficiaries 83⅓% where there were five children, down to 50% after the children attained majority; *Petition of Moore-McCormack Lines Inc.*, 184 F. Supp. 585, 593-594 (S.D.N.Y., 1960) modified on other grounds, 295 F. 2d 583 (2 Cir., 1961), cert. den. 368

U. S. 989, 7 L. ed. 2d 526 (1962), where 75% of the prospective earnings were allowed where there were two children and only 50% to the wife alone. To the same effect, see also *Jennings* v. *United States*, 178 F. Supp. 516, 531-532 (D. Md., 1959), rev'd on other grounds, 291 F. 2d 880 (4 Cir., 1961).

The decision of District Judge Edelstein, affirmed by the Court of Appeals in the present case, is at variance with this not inconsiderable body of law and is not supported by a single cited case or any which petitioner has been able to find.

Petitioner in its brief in the Court of Appeals, following the principles heretofore consistently followed in the Second Circuit (reducing prospective earnings by only 25% while there were two minors and 33⅓% while there was one minor and 50% for the succeeding years), demonstrated that the award in this case was excessive by an amount of approximately $78,000.

In addition, in the present case the District Court has made a finding of prospective post-trial earnings by decedent of an average of $15,000 per year in the 14 post trial years of decedent's assumed work expectancy without a single iota of evidence in the record to support such a finding.

Compare the award in the present case with the awards made in *United States* v. *Sommers*, 351 F. 2d 354 (10 Cir., 1965), cited in the decision of the Court of Appeals in this case (*infra*, p. 35). In *United States* v. *Sommers*, the Court had before it the case of a 43-year-old man making $10,000 a year and having three children, aged 20, 18 and 5, and the case of a 36-year-old decedent having three children, aged 12, 8 and 6, making $11,205 a year, where there was actual proof that decedent would have earned $22,500 within a short time. In the case of the 43-year-old man the award was in the amount of $123,000. In the case of the

36-year-old man where there was actual proof that his earnings would have doubled within a short time, the award was only $219,000.

In the instant case the District Court found that decedent would have earned $55,000 for the five years since his death prior to trial, an average of $11,000 a year. Even assuming that decedent would have continued to increase his earnings on an average of $1,000 a year for each five-year period, of which there was no proof, petitioner demonstrated in its brief on appeal that the award was nonetheless excessive by at least $89,000.

The Court of Appeals has said that in affirming on the question of damages it took into account the decision of this Court in *Gruenthal* v. *Long Island R.R.*, 393 U. S. 156, 159 (1968) (C. A. Op. *infra*, p. 35), but it has made no analysis whatever in its decision of the evidence in support of the award made, of which it is submitted there was none, except for the earnings at the time of death of approximately $10,000, and has failed to note that the District Court made no deduction from prospective earnings for the decedent's own proportion of his living and household expenses. Moreover, it has completely disregarded the fact that the finding of post trial earnings of approximately $15,000 a year is entirely without any evidentiary support.

The award of damages here sustained by the Court of Appeals is so egregiously at variance with the rules of damages respecting pecuniary injuries in death actions as heretofore established in the Federal Courts as to require review by this Court.

It is to be hoped that the time has not yet come when a small corporate defendant in a diversity action must stand defenseless and without recourse before the Federal Bar of Justice, deprived of the protection of the Laws of the State in which it does business and subjected to the vagaries of personalized judicial treatment in disregard

of well established legal precedent. If such time has come, then it is time that the Federal Courts be deprived of diversity jurisdiction, since it will no longer have served the purpose for which it was originally designed of securing equal protection under the law to all litigants.

Conclusion

For the reasons above stated, a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit to review the judgment and decision of that Court affirming the judgment entered herein in the United States District Court for the Southern District of New York in favor of the respondent, Nancy Gasperino, as Administratrix of the Estate of Gregory Gasperino, deceased, against petitioner, Larsen Ford Inc., in the amount of $280,669 and in favor of respondent, third-party defendant, Ford Motor Company, against petitioner, dismissing the third-party complaint herein.

Respectfully submitted,

Edmund F. Lamb,
Attorney for Petitioner.

Dated: New York, N. Y.
Sept. , 1970.

Statutes Involved.

SECTION 200 OF THE LABOR LAW OF THE STATE OF NEW YORK AS IN EFFECT AT THE TIME INVOLVED:

(McKinney's Consolidated Laws of New York Annotated, Book 30 (1965), p. 141.)

"§ 200. General duty to protect the health and safety of employees; enforcement

1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.

2. If the commissioner finds that any machinery, equipment, or device in any place to which this chapter applies is in a dangerous condition, or finds that any area to which this chapter applies is in a dangerous condition, he may attach a notice to such machinery, equipment, or device, or post a notice in such area warning all persons of the danger. Such notice shall prohibit the use of such machinery, equipment, or device or prohibit further work in or occupancy of such area until the dangerous condition is corrected and the notice is removed by the commissioner, or until sixty days have elapsed, whichever period is shorter. The filing with the board of a petition for a review of the validity and reasonableness of the commissioner's order pursuant to section one hundred ten of this chapter, shall not stay further proceedings: provided,

however, that the board, in its direction, may upon application of the petitioner stay further proceedings. The board shall grant or deny such application for a stay within seventy-two hours after the filing of the application.

3. Whenever a notice is attached or posted as provided in subdivision two of this section, the attorney general may institute a proceeding to enjoin the use of such machinery, equipment, or device or to enjoin further work in or occupancy of such area. Such proceeding shall not be stayed by the filing with the board of a petition for a review of the validity or reasonableness of a commissioner's order pursuant to section one hundred ten of this chapter."

Decedent Estate Law of the State of New York.

ARTICLE 5—ACTION FOR CAUSING DEATH OF DECEDENT

(McKinney's Consolidated Laws of New York Annotaded, Book 17B, EPTL 11-1.1 to End (1967), Appendix 1, p. 497)

"§ 130. Action by executor or administrator for negligence or wrongful act or default causing death of decedent

The executor or administrator duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country, of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the

decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the husband, wife or next of kin, do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit. Added L. 1920, c. 919, § 1, eff. April 15, 1921."

"§ 132. Amount of recovery

The damages awarded to the plaintiff may be such a sum as the jury upon a writ of inquiry, or upon a trial, or, where issues of fact are tried without a jury, the court or the referee, deems to be a fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons, for whose benefit the action is brought. In every such action now or hereafter pending, in addition to any other lawful element of the damages recoverable, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent paid by a husband or wife or next of kin or for the payment of which any such person is responsible, also shall be deemed proper elements of damage. If the decedent leaves surviving a father and a mother, the death of such father prior to the verdict shall not affect the amount of damages recoverable. Interest upon the principal sum recovered by the plaintiff, from the date of the decedent's death, shall be added to and be a part of the total sum awarded. Added L. 1920, c. 919, § 1; amended L. 1935, c. 224; L. 1949, c. 638, § 2; L. 1962, c. 310, § 112, eff. Sept. 1, 1963."

Opinion of the United States Court of Appeals For the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 302—September Term, 1969.

(Argued November 18, 1969 Decided May 25, 1970.)

Docket No. 33891

NANCY GASPERINO, as Administratrix of the Estate of GREGORY GASPERINO,

Plaintiff-Appellee,

—v.—

LARSEN FORD, INC.,

Defendant and Third-Party Plaintiff-Appellant,

—v.—

FORD MOTOR COMPANY

Third-Party Defendant-Appellee.

Before:

LUMBARD, *Chief Judge,*
ANDERSON, *Circuit Judge,* and
DANAHER, *Senior Circuit Judge.**

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* John A. Danaher, Senior Circuit Judge of the District of Columbia Circuit, sitting by designation.

In this wrongful death action in the United States District Court for the Southern District of New York, tried before District Judge David N. Edelstein, sitting without a jury, judgment was entered solely against Larsen Ford, Inc. awarding the beneficiaries of the late Gregory Gasperino damages of $215,899 plus interest of $64,770, and dismissing the Larsen Ford, Inc. claim over against Ford Motor Company. Judge Edelstein's opinion, including his detailed findings and conclusions of law appears at 300 F. Supp. 1482 (1969). We affirm.

EDMUND F. LAMB, New York City (Purdy, Lamb & Catoggio, of counsel to Schaffner and D'Onofrio of New York, N. Y.), *for Defendant and Third-Party Plaintiff-Appellant, Larsen Ford, Inc.*

JOEL NORMAN AURNOU, White Plains, N. Y. (Greenspan, Aurnou & Davis, White Plains, N. Y.), for *Appellee Gasperino.*

WILLIAM F. MCNULTY, New York City (of counsel to Daniel J. Coughlin, New York, N. Y.), *for Third-Party Defendant-Appellee, Ford Motor Company.*

DANAHER, *Senior Circuit Judge:*

It will suffice for present purposes to summarize the background. In April, 1964 Ford Motor Company (here-

inafter Ford), caused to be delivered to a storage basement owned by its dealer Larsen Ford, Inc. (hereinafter Larsen), approximately one hundred new Mustang model cars. Ford desired that the new models be secluded from public view while a promotional campaign was being perfected. It had been arranged that Larsen was to receive a substantial consideration for the use of its premises. Larsen already had some thirty cars of its own in the basement so that after delivery of the new Mustangs, cars were tightly parked in rows, side by side, and bumper to bumper.

To ready the cars for public showing on April 14, Gregory Gasperino, an employee of Ford, proceeded to the Larsen basement garage on April 3, 1964. He worked long hours over the next few days, including Saturday, April 4 and Sunday, April 5. Joined by other Ford employees, Gasperino resumed work on Monday morning, April 6, 1964, and was so employed when, about 2:30 P.M., he collapsed. Police were called, oxygen was administered to Gasperino and to two of his co-employees, but at 3:50 P.M., after removal to a hospital, Gasperino died. An autopsy disclosed that the cause of death was an occlusion of the coronary arteries induced by carbon monoxide poisoning, superimposed upon a pre-existing, but previously unknown, atherosclerosis. The medical evidence was uncontroverted. The record overwhelmingly supports Judge Edelstein's conclusion that the proximate cause of death was carbon monoxide poisoning which precipitated the fatal heart attack.

The operations in which Gasperino and his co-employees were engaged included installation of wheel covers and of radio antennas, removal of chucks or blocks which had

fastened the cars to carriers, and the checking of fluid levels. The engine of each car had to be started in order to jockey each car into position to afford room to carry out the required operations. The result, as one witness put it, was that there "was quite a bit of raw exhaust fumes in the air."

The Larsen basement had no mechanical ventilation. Indeed Larsen personnel had been forbidden to work in the basement storage area. Moreover, the Larsen mechanics in the dealership's shop upstairs were protected by necessary hoses and exhaust systems. Carl Larsen, President of Larsen Ford, Inc., knew that the Mustangs were to be prepared for public exhibition and was aware of the nature of the operation to be performed on its premises.

Under such circumstances, the district judge as the trier of fact found that Larsen's knowing failure to provide means of exhausting carbon monoxide from the basement area had resulted in denying protection to Gasperino and his co-employees, and accordingly he concluded that Larsen had violated the duty imposed upon it pursuant to section 299 of the Labor Law of the State of New York.[1] Judge Edelstein reasoned that the basement area, within the meaning of section 299, had become a "work room in a factory" as to which Larsen was bound to provide "proper and sufficient means of ventilation." The trier thus viewed section 299 as designed to protect working men in "factories," and decided that Gasperino as such a workman

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[1] *Gasperino* v. *Larsen Ford, Inc.*, 300 F. Supp. 1182, 1186, note 2, and accompanying text.

was a member of the class for whose protection the statute had been enacted.[2]

It was conceded that there were no mechanical ventilating systems in the basement work area. Thus, the trial judge additionally found that Larsen, while aware of the operations to be performed, had failed to provide means of ventilation to exhaust the carbon monoxide generated during the course of readying the cars, and so had failed to provide a safe place in which Gasperino and his co-employees could work. Judge Edelstein concluded that such failure constituted a violation of section 200 of the Labor Law of New York, and further that non-compliance with the statutory duty so devolving upon Larsen was active negligence which barred Larsen's claim to indemnity from Ford. We agree.

Section 200 clearly applied for the benefit of all persons employed in the Larsen premises or "lawfully frequenting such places." Larsen was quite aware of the purposes for which the work area was to be utilized by the Ford employees. The trier further found, fully supported in the record, that there existed in the Larsen basement a "deceptively dangerous condition." Lacking ventilation, indeed with some of the windows covered with plastic sheets,

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[2] Without hesitancy we could agree had Gasperino been employed by Larsen. Cf. *Osborne* v. *Salvation Army*, 107 F. 2d 929 (2d Cir. 1939). We have been cited to no decision of the New York Court of Appeals, and our diligent search has disclosed none, which holds that § 299 applies to a workman employed by other than the owner or lessee of the building in which operations are being conducted.

We think it unnecessary further to consider Judge Edelstein's appealing treatment of this aspect of the case, for we are satisfied that the judgment must be affirmed upon his alternative conclusion that section 200 of the Labor Law here applied.

with car after car emitting exhaust fumes, there was no evidence that the dangerous conditions prevailing were open and obvious. On the contrary, it would strain credulity to assume that Gasperino and his co-employees,[3] all experienced workers, would still have continued to conduct the required operations had they been aware of the threat to their safety.[4]

Recognizing Larsen's duty to provide a safe place to work within the meaning of section 200, and accepting the trier's finding that Gasperino was not contributorily negligent, such circumstances require us to sustain Judge Edelstein's ultimate conclusion that Larsen's failure in the respects noted constituted active negligence.[5] Our disposition of this case must be deemed controlled by our decision in *Burns* v. *Cunard Steamship Company*, 404 F. 2d 60 (1968), *cert. denied*, 393 U. S. 1117 (1969).

We fairly should observe that the record here discloses a case extremly well tried by respective counsel. Judge Edelstein's detailed findings obviously took into account the claims of the parties on the various aspects advanced before him. In the respects which we have accepted as decisive, we perceive no error in the conclusions reached by Judge Edelstein. Having carefully studied the record

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[3] There were at least five men engaged in the operations, each individual working independently of the other, moving out cars "as we needed them to work on them."

[4] Quite apart from Judge Edelstein's finding, it reasonably may be presumed that the deceased Gasperino acted with due care in view of the human instinct of self-preservation and the natural disposition of people to avoid personal harm. Cf. *Eastern Air Lines* v. *Union Trust Company*, 221 F. 2d 62, 72 (D. C. Cir. 1955).

[5] The trier found that Gasperino "was in no way negligent," and that Larsen "was the active tortfeasor if those words have any meaning at all." 300 F. Supp. 1191.

and the authorities cited to us, we are satisfied that the Plaintiff-Appellee is entitled to her judgment on the basis outlined and, in accordance with precedent, that Larsen was not entitled to indemnity from Ford.

The Defendant-Appellant also claims that the damages awarded were excessive. That an award may be reviewed is beyond peradventure. *Dagnello* v. *Long Island Rail Road Co.*, 289 F. 2d 797 (2 Cir. 1961); *Wicks* v. *Henken*, 378 F. 2d 395 (2 Cir. 1967); *Caldecott, Admx.* v. *Long Island Lighting Co.*, 417 F. 2d 994 (2 Cir. 1969) and *Bazydlo* v. *Placid Marcy Co., Inc.* (2 Cir. March 3, 1970). Larsen has advanced its contention earnestly, and we may observe that at first blush, the award seems excessive.

However, taking account of *Grunenthal* v. *Long Island R. R.*, 393 U. S. 156, 159 (1968) we have ourselves examined the record evidence involved in the findings of the trial judge who had carefully detailed the respective elements on which he based the award. Judge Edelstein approached the problem in respects not greatly different from those considered in *United States* v. *Furumizo*, 381 F. 2d 965 (9 Cir. 1967), where the judge, sitting without a jury, spelled out the factors upon which he predicated his computation and the ultimate award. See also *United States* v. *Sommers*, 351 F. 2d 354, 359-360 (10 Cir. 1965); *O'Connor* v. *United States*, 269 F. 2d 578 (2 Cir. 1959). After a fair appraisal of the claims advanced by Larsen measured against the findings, not without support in the record, we are satisfied the award should be permitted to stand.

Affirmed.

Opinion of the United States District Court, Southern District of New York.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

NANCY GASPERINO, as Administratrix of the Estate of GREGORY GASPERINO, Deceased,

Plaintiff,

against

LARSEN FORD, INC.,

Defendant and Third-Party Plaintiff,

against

FORD MOTOR COMPANY,

Third Party Defendant.

65 Civ. 828

EDELSTEIN, D.J.

OPINION

This is a wrongful death action commenced by Mrs. Nancy Gasperino as the duly authorized administratrix of the Estate of Gregory Gasperino, deceased, against Larsen Ford, Inc., defendant and third-party plaintiff. Larsen has impleaded Ford Motor Co. Decedent, Gregory Gasperino, was at all relevant times an employee of the third-party defendant, Ford Motor Co., (hereinafter Ford), employed as an assistant district service manager. The court has jurisdiction of the parties and the subject matter of this action by reason of diversity of citizenship and an amount

in controversy in excess of $10,000.00 exclusive of interest and costs.

On April 6, 1964, the day decedent met his death, he was working in the basement of the premises of defendant Larsen Ford, Inc., (hereinafter Larsen).

In the spring of 1964 the Ford Motor Co. introduced to the public for the first time a new model Ford known as the Mustang. Between the time of the arrival of these cars in New York from Detroit and the date for their first public showing Ford desired to keep this new model from public view for special promotional reasons. Lacking an indoor area capable of keeping some one hundred of the new cars under wraps, Ford made an arrangement with Larsen, a Ford dealer, to store the new cars in Larsen's basement storage area. Certain "make-ready" work was to be done on the Mustangs prior to the first public showing and Larsen knew of this fact. The task of readying these Mustangs for public viewing fell on decedent Gasperino and five co-workers, all of whom were highly qualified for their tasks. He was notified of his assignment on April 3, 1964, and proceeded to the premises of Larsen that same day to commence work on the Fords. Inasmuch as Ford planned to show the cars on April 14th decedent was forced to work on Friday, April 3rd, from 8:30 a.m. until 2:00 a.m. on Saturday, April 4th, and Sunday April 5th from 8:30 a.m. until 5:30 p.m., as well as on Monday, April 6th, from 8:30 a.m. until he was stricken, at approximately 2:30 in the afternoon.

During the course of the preparation and pre-delivery check-up on the cars it was necessary to start and stop the engines of these vehicles in order to jockey them into position so that the necessary preparations could be done on the cars. Larsen knew, or should have known, of this fact, inasmuch as there were one hundred and thirty automobiles (100 of which were new Mustangs) enclosed in the basement area of some 20,000 square feet.

The basement area of Larsen Ford in which the decedent and his fellow employees were working was provided with no mechanical ventilation, fans, ducts, pipes, hoses, or any other mechanical means of extracting gases, vapors or fumes from the atmosphere in the basement.

Returning specifically to the events that occurred on April 6th, decedent was noticed slouched over in an automobile in the basement at approximately 2:30 p.m. Fellow employees, Fausel and Fritts, assisted him outside into the fresh air and observed that decedent was shaky, sweating excessively, and appeared to be in severe physical discomfort. At about the same time Fausel and Fritts also suffered nausea, dizziness, and weakness. The police were summoned and an officer responded immediately and administered between ten and fifteen minutes of oxygen to the decedent. In addition oxygen was administered to Fausel and Fritts, Gasperino's fellow employees. Decedent appeared revived after this administration of oxygen but shortly thereafter he complained of pains in his chest and was promptly taken to a nearby local hospital. At the hospital oxygen was again administered to Gasperino for not less than ten minutes. At approximately 3:50 p.m. that day, decedent died. An autopsy was performed the following day. The report of the autopsy stated that the cause of death was an atheromatous occlusion of the coronary arteries due to atherosclerosis. A subsequent toxicological examination of the blood sample disclosed a residue of 13.6 percent of carbon monoxide in the decedent's blood after death.

Plaintiff called Dr. David H. Goldstein, a qualified toxicologist, to give his opinion of the cause of Gasperino's death. Based on an assumption of divers facts in evidence surrounding Gasperino's death, such as the working conditions in Larsen's basement storage area, the work that was being done there, the conditions of ventilation, the illness

that beset Gasperino, the administration of oxygen to him, and, thereafter, the autopsy and toxicological report. Dr. Goldstein testified that Gasperino had inhaled enough carbon monoxide gas to cause him to suffer carbon monoxide poisoning, which poisoning in turn precipitated his fatal heart attack.

Although the autopsy disclosed a pre-existing progressive atherosclerotic heart disease it was uncontradicted that the decedent had no prior history of complaints of heart disease, no coronary profile, and was sufficiently well compensated to perform his normal duties without complaint up to the time he was stricken on April 6, 1964.

The Westchester County Coronoer, Dr. Bultman, who had performed the Gasperino autopsy was also called to testify as a witness. Dr. Bultman generally shared Dr. Goldstein's opinion. Dr. Bultman's testimony—that the carbon monoxide in decedent's blood contributed in part to decedent's death and was indeed a direct proximate cause of his death—remained unshaken, despite a vigorous attempt on cross examination to show that this testimony was inconsistent with his autopsy report. The court found the coroner to be an entirely impartial and believable witness. Accordingly, the court places great weight on his testimony.[1]

The record is replete with testimony as to the percentages of carbon monoxide in the blood which would cause symptoms of carbon monoxide poisoning or cause instant death. Likewise, much testimony was introduced to explain the amount of pure oxygen and oxygen plus natural air needed to dilute the percentage of carbon monoxide in decedent's

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[1] A letter of one Joseph Dean Edwards addressed to a Gerard S. Foley of Ford, and a report entitled "Workmen's Compensation Investigation Report" were received in evidence subject to a motion to strike. Since both of these documents are at best cumulative the court found no need to consider them.

bloodstream to 13.6 percent, the amount found in Gasperino's blood after his death. An analysis of these figures would serve no useful purpose. Since no countervailing medical or scientific testimony was adduced the medical testimony presented to this court that Gasperino died of an atheromatous occlusion of the coronary arteries (a heart attack) which occlusion was proximately triggered by carbon monoxide poisoning, stands uncontradicted.

Plaintiff's first legal argument is that the premises of Larsen Ford were in use as a factory within the meaning of §§ 299 and 316 of the Labor Law of the State of New York,[2]

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[2] N. Y. Labor Law § 299 (McKinney 1965) reads in part as follows:

"1. Every work room in a factory shall be provided with proper and sufficient means of ventilation natural or mechanical or both, as may be necessary . . .

"2. All machinery creating dust or impurities in quantities tending to injure the health of employees shall be equipped with proper hoods and pipes connected to an exhaust fan of sufficient capacity and power to remove such dust or impurities; such fan shall be kept running constantly while such machinery is in use . . .

"3. If dust, gases, fumes, vapors, fibers or other impurities are generated or released in the course of the business carried on in any workroom of a factory, in quantities tending to injure the health of the employees, suction devices shall be provided which shall remove such impurities from the workroom, at their point of origin where practicable, by means of proper hoods connected to conduits and exhaust fans. Such fans shall be kept running constantly while the impurities are being generated or released. . . ."

N. Y. Labor Law § 316 (McKinney 1965) reads in part as follows:

"1. Except as in this article otherwise provided, the person operating a factory, whether as owner or lessee of the whole or a part of the building in which the same is situated or otherwise, shall be responsible for the observance of the provisions of this article, anything in any lease or agreement to the contrary notwthstanding."

that on April 6th the basement area in which the decedent was working was a workroom in defendant's factory within the meaning of § 299 of that law, that the decedent on that date was a person within the class intended to be protected by §§ 299 and 316 of that law, and that defendant Larsen Ford violated § 299 by failing to provide mechanical ventilation as required therein. His second legal argument is that Larsen violated § 200 of the Labor Law by failing to provide decedent with a safe place to work. Larsen denies the applicability of these statutes to the facts of the case in hand, and in any event, cross-claims against Ford Motor Co.

Section 299 of the Labor Law of New York requires that each workroom in a factory be provided with proper and sufficient means of ventilation, natural or mechanical, as may be necessary. There is a provision that if dust, gases, fumes, vapors, fibers, or other impurities are generated or released in the course of the business carried on in any workroom of a factory in quantities tending to injure the health of the employees, then suction devices must be provided which will remove the impurities from the workroom by means of proper hoods connected to conduits and exhaust fans.

"Factory" is defined by § 2(9) of the Labor Law to include a workshop or other manufacturing establishment where one or more persons are employed in manufacturing including making, altering, repairing, finishing . . . any article or thing in whole or in part and includes all buildings, sheds, structures, or other places used for or in connection therewith. Section 2(7) of that law defines "employed" to include "permitted or suffered to work." Thus by statutory definition the court concludes that Gasperino was employed in Larsen's basement since it is clear that he was "permitted or suffered" to work there at the time of his accident. Likewise, by statutory definition, the court concludes that Larsen's garage was a factory and that the

basement premises of that garage was a workshop therein at that time.

It is conceded by defendants that there were no mechanical exhaust or ventilation systems in the basement. It is also conceded that Larsen, as lessee of the premises stood in the shoes of an owner of those premises. Indeed, Larsen actively operated and controlled those premises in the conduct of his business.

Larsen had actual knowledge that the Mustangs were being prepared for public exhibition. He knew, or should have known, based on his experience, that they were being jockeyed back and forth under their own power. Altogether he was aware of the operation which was being performed on his premises with his consent and for a consideration. The basement area in which Gasperino was working was an integrated part of Larsen's total physical plant. This total business facility was used in its entirety in the manifold operations incidental to Larsen's business. The court finds that Larsen was a person operating a factory within the meaning of § 316(1).

Defendant urges, however, that plaintiff may not predicate liability on defendant based on § 299 because that section is limited exclusively to the protection of employees and that it imposes obligations only upon the employers of these employees. Thus, in the instant case, defendant argues that only if Gasperino had been an employee of Larsen Ford in the accepted employer-employee relationship would Larsen Ford have had duties and obligations running to him under § 299.[3] But the protection afforded by § 299 is not so narrowly limited.

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[3] It is conceded that Gasperino was not an employee of Larsen Ford as that term is usually employed, that he received no salary or remuneration from Larsen, and that Larsen had no control of Gasperino or say in the manner in which Gasperino was to discharge his duties.

Defendant places much reliance on the 1940 case of *Savage* v. *Mathieson Alkali Works*, 174 Misc. 1022, 22 N.Y.S. 2d 692 (Sup. Ct. Niagara County 1940), *aff'd without opinion*, 261 App. Div. 1053, 27 N.Y.S. 2d 454 (4th Dept. 1941). In that § 299 case plaintiff, Savage, was an employee of DuPont; DuPont was in no way involved in the suit. Savage was injured at a place removed from defendant's premises. Indeed, the plaintiff never even entered defendant's factory. In dismissing this § 299 claim the court said, *inter alia*, "The plaintiff does not allege that he was an employee of the defendant; he alleges that he was an employee of E. I. DuPont de Nemours Company, Inc. in an industrial plant located in close proximity to the premises of the defendant. The plaintiff charges the defendant with violation of statutes prescribing conditions to be maintained within the interior of the defendant's factory, Labor Law §§ 290, 299(1). Insofar as such statutes relate to the atmospheric and other working conditions in the defendant's fatcory, they are for the protection of the employees of the defendant and a violation of them creates under certain circumstances, a cause of action in favor of employees of the defendant and no others. *Schmidt* v. *Merchants Dispatch Transportation Co.*, 270 N. Y. 287, 200 N. E. 824." At 695. The lack of nexus between plaintiff and defendant in *Savage* distinguishes it from the instant case so as to make *Savage* not particularly helpful.

More apposite than *Savage* is *McCullough* v. *National Dairy Products Corp.*, 12 Misc. 2nd 778, 177 N.Y.S. 2d 435 (Sup. Ct. Erie Co. 1958). There, plaintiff, an employee of Lincoln Carting Company, not a party to this action, drove Lincoln's truck to defendant's plant to make a delivery under a contract of delivery between Lincoln and defendant. At defendant's plant the plaintiff proceeded to unload

the syrup by use of an auxiliary gasoline motor and pump supplied and owned by plaintiff's employer. Plaintiff, as a result, died of carbon monoxide poisoning. His administratrix brought suit under §§ 200 and 299. Although the court dismissed the complaint, it was careful to point out that the cause of death was a defect in the contractor's (the plaintiff's employer) motor and pump. There was no defect in the plant of the defendant.

> "The contractor, Lincoln, was bound by contract to furnish all instrumentalities by which the sweetose was to be transported and delivered; *there was no defect in the garage and loading room;* it was not unsafe *qua* garage—*the danger arose from the method by which the sweetose was unloaded* into (defendant's storage tank); *the defect was in the contractor's outfit,* consisting of an auxiliary gasoline motor and pump and *not in the plant of the defendant.* Therefore the second cause of action in the complaint fails to state a cause of action." At 437. (emphasis added)

The crucial difference between *McCullough* and the instant case is that the plant; *i.e.,* the basement premises of Larsen, was defective. It is not a question of whether Gasperino's equipment was defective, but that the facilities in which he worked were unsuited for the purposes for which they were used. As the Court of Appeals said in *Hess* v. *Bernheimer & Schwartz, Pilsener B. Co.,* 219 N. Y. 415, 114 N. E. 808 (N. Y. 1916), "a plant is defective when any part of it is not in a proper condition for the purpose for which it was intended." At 418. Finally, it can be seen upon reflection that § 299 was designed to protect workingmen who work in factories; Gasperino was such a workman. There can be no question, then, that Gasperino was a member of the

class for whose protection § 299 was enacted. *Osborne* v. *Salvation Army*, 107 F. 2d 929 (2d Cir. 1939).

A violation of § 299 eliminates the plaintiff's need to show that the defendant was negligent. As the Court of Appeals said in *Schmidt*, "the legislature has cast upon the defendant a duty not measured by the usual norm of what a reasonably prudent man would do under the same circumstances. The duty is imposed for the special "benefit and protection of employees . . . The statute does not merely define the degree of care required in that occupation. It imposes an absolute duty upon employers to provide adequate and proper safeguards . . . liability for disregard of the statutory duty regardless of negligence is implied . . ." At 305-6. *Accord*, *Michalek* v. *U. S. Gypsum Co.*, 16 F. Supp. 708 (W.D.N.Y. 1936) "a violation of the duties imposed constitutes negligence as a matter of law. The statute being for the benefit of a particular class where one of that class is injured because of its violation recovery may be had irrespective of negligence on the part of the defendant." At 709; *Kolenko* v. *Certainteed Prod. Corp.*, 20 F. Supp. 920 (W.D.N.Y. 1937) "violation of a statute imposing the duty to furnish safeguards for the benefit of employees is conclusive as to the negligence of the person charged with the violation." At 921.

Another problem in a § 299 case is whether or not the defense of contributory negligence is a bar to the action. It would appear not, although there is some authority for the proposition that contributory negligence might or may be a bar to a § 299 action, *see Kolenko & Michalek*, *supra*. Since the statute is designed to impose an absolute duty for the protection of a class of persons against definable hazards which they themselves are incapable of avoiding, *see Schmidt*, *supra*; *cf. Osborne*, *supra*; *Kochig* v. *Patrick*

Construction Corp., 298 N. Y. 313, 83 N. E. 2nd 133 (1948),[4] it would seem contrary to the purpose of § 299 to permit contributory negligence to serve as a defense to this kind of action.

Judge Fuld, writing for a unanimous court in *Koenig*, although discussing a provision of the labor law different from the one involved here, laid down general principles particularly well applicable to a discussion of § 299:

> "Irrespective of how the courts may once have viewed the question . . . it is our judgment that both sound reason and persuasive decisions, involving statutes whose content and purpose are similar to those of section 240, require the conclusion that that statute does not permit the worker's contributory negligence to be asserted as a defense." (citations omitted) *Koenig* at 317.

The court is convinced that a § 299 violator cannot assert the defense of contributory negligence. Sec. 299 aside, however, defendant's claim of contributory negligence against Gasperino still cannot prevail. In a New York State death action the burden is upon the defendant to prove any contributory negligence by a fair preponderance of the credible evidence.[5] The defendant has failed to carry its burden. Given the facts here, the court cannot

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[4] Cf. Federal Employees Liability Act, 45 U.S.C. § 53, "*Contributory Negligence; diminution of damages*, . . . [N]o such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

[5] 17B McKinney's E.P.T.L. § 5-4.2.

say that Gasperino failed to use due care and ordinary prudence in avoiding injury to himself, nor that he failed to make reasonable use of his faculties to discern and avoid any dangers in the performance of his job. Gasperino was on Larsen's premises with its consent and permission. The basement location was not affirmatively selected by Gasperino, nor did Gasperino have any personal choice or say in the arrangements between Ford and Larsen. In fact, the basement location was designated and made available to Ford by Larsen. This location consisted of approximately 20,000 square feet, approximately one-half an acre. There was an 8 x 9 foot overhead door leading outside at the basement level, and an 18 foot wide ramp leading up to the main floor and outside through a 10 x 12 foot overhead door. In addition along the north side of the basement there were a series of 14 manually operated casement windows having dimensions of 6 x 6 feet; along the south wall there were more windows. Some of these windows had broken panes of glass and some of the other windows were covered with plastic sheets. Altogether the premises presented an illusion of a safe place in which to work, when, in fact, it was not safe at all. Its appearance was so deceiving as to be able to mask successfully a very dangerous condition.

The garage's deceptively dangerous condition could hardly have been realized in the exercise of ordinary prudence and discretion. It is indeed doubtful that the danger of carbon monoxide poisoning became apparent until Gasperino and two of his co-workers were stricken, and perhaps not even then. In sum, what the record reveals to this court is that Gasperino asserted that degree of care which others of his type and position would ordinarily exercise under comparable conditions and circumstances.

Cases—relied on by defendant—such as *Tournes* v. *Park Motor Sales*, 7 A. D. 2d 109, 180 N.Y.S. 2d 553 (1st Dept. 1958), *aff'd* 194 N.Y.S. 2d 37 (1959), are hopelessly inapplicable to the facts in this case. Critical to the court's finding in *Tournes* was that the plaintiff was conscious of a danger arising from the negligence of another. It is beyond doubt in the instant case that Gasperino was not conscious of the danger arising from Larsen's violation of § 299.

For the court to find that Gasperino was contributorily negligent under all the circumstances of this case would require a rejection of all the credible evidence which preponderates in Gasperino's favor.

Section 200

Sec. 200 of the Labor Law mandates that "all places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places."

This court concluded, *supra*, that the basement of the Larsen garage was a workroom in a factory as that term is used in the Labor Law, and that Larsen stood in the position of an owner. It is clear that under § 200 "the owner occupant of a building has the affirmative obligation of providing a place safe for the work of the employees of an independent contractor properly on the premises." *Gasper* v. *Ford Motor Co.*, 203 N.Y.S. 2d 382 (Ad. 4th Dept. 1960). *Accord*, *Seigel* v. *Prima Concrete Construction Corp.*, 279 N.Y.S. 2d 95 (1967).

Although it is clear that the courts of New York have constantly construed § 200 as a codification of the Common

Law in regard to the obligations of an employer to provide employees and other persons lawfully frequenting the premises with a safe place to work,[6] it is equally clear that decedent Gasperino was lawfully frequenting Larsen's premises and was not a trespasser therein. In addition, Carl Larsen himself admitted that he did not allow his own employees to use the basement portion of his premises for mechanical or make-ready operations on automobiles. In addition, it is undisputed that prior to the 6th of April 1964 Larsen had suffered or permitted some windows to be covered with a plastic material in these premises further decreasing natural ventilation, and, concededly, there were no mechanical ventilation facilities in the basement. It is clear on the basis of all the credible evidence that Larsen knew that in the course of the operations on these automobiles that the automobiles would be moved on their own power and that the engines would be running. Yet Larsen at no time warned the decedent or his colleagues of the danger that could develop in the basement even though it never would allow its own employees to perform similar work in this area. This court finds, therefore, that on all of the evidence that defendant Larsen did not comply with § 200[7] of the Labor Law insofar as he did not provide a reasonably safe place for persons lawfully frequenting his premises.

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[6] See *Zinsenheim* v. *Congregation Beth David Inc.*, 200 N.Y.S. 2d 753 (1960); *Bein* v. *City of New York*, 271 F. Supp. 542 (S.D.N.Y. 1967).

[7] That the defense of contributory negligence is available in a § 200 violation is not important in this matter because the court has found that Gasperino was not contributorily negligent. Insofar as § 200 allows a defense of contributory negligence and § 299 does not, it is explicable in that § 200 represents a codification of the common law whereas § 299 expands the common law. See *Bein*, *supra*.

THE CROSS-CLAIM

Defendant, Larsen Ford, cross-claims against the Ford Motor Company in the event that it (Larsen Ford) is found liable to Gasperino. This court, having found Larsen liable to Gasperino must now consider the cross-claim. The essence of Larsen's argument is that the Ford Motor Company was the active tortfeasor in this case and that accordingly Larsen should be able to obtain indemnity because it was at most merely a passive tortfeasor.

To give credence to Larsen's cross-claim this court would have to ignore its crucial findings that Larsen violated §§ 200 and 299 of the Labor Law of New York insofar as it failed to provide the plaintiff with a safe place to work, failed to provide the required and appropriate ventilation facilities, and that Gasperino was in no way negligent. The court therefore finds that Larsen was the active tortfeasor if those words have any meaning at all.

The recent case of *Burns* v. *Cunard S. S. Co.*, 404 F. 2d 60 (2d Cir. 1968), is analogous to the instant case. There the plaintiff, employee of John T. Clark & Son, was injured when the wheel of a car he was towing went into a hole in the pavement of a work area of Cunard. The Clark firm had been employed by Cunard to remove cargo from one of the latter's vessels. The court in holding that Cunard did not have a claim over against Clark said: "Under New York Labor Law § 200, Cunard had a duty to inspect the area and to repair the hole, since a reasonable inspection would have disclosed its existence. Cunard's failure to do so was active negligence and thus it cannot obtain indemnity from Clark." (at 61.) In the instant case Larsen failed to supply the needed ventilation facilities and a safe place to work, even though he knew,